MDR

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Micheal Andrew Nunez,

Plaintiff,

v.

Mark D. Napier, et al.,

Defendants.

No. CV 18-00244-TUC-JAS

ORDER

Plaintiff Micheal Andrew Nunez, who is confined in the Pima County Adult Detention Center, has filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1)[1] and an Application to Proceed In Forma Pauperis (Doc. 2). The Court will grant the Application to Proceed, order Defendants Hill, Sullivan, Duarte, and Silva to answer Count One of the Complaint; order Defendant Song to answer Count Two; and dismiss Count Three and the remaining Defendants without prejudice.

. . . .

[1] In the Complaint, Plaintiff indicates that he is filing "on his behalf and on behalf of all pretrial detainee[]s in the Pima County Jails." Plaintiff cannot sue on behalf of other detainees. A party is permitted to plead and conduct his or her case "personally or by counsel." 28 U.S.C. § 1654. A non-lawyer may appear on his own behalf in his own case but "has no authority to appear as an attorney for others than himself." *Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) (quoting *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987)). A "'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 610 (9th Cir. 2005) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also Johns*, 114 F.3d at 876 ("constitutional claims are personal and cannot be asserted vicariously"). Thus, Plaintiff may only pursue his own claims, not those of other detainees confined in the Pima County Adult Detention Center.

TERMPSREF

I. Application to Proceed In Forma Pauperis and Filing Fee

The Court will grant Plaintiff's Application to Proceed In Forma Pauperis. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of $350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of $13.07. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income credited to Plaintiff's trust account each time the amount in the account exceeds $10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

A pleading must contain a "short and plain statement of the claim *showing* that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, although a plaintiff's

specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other "more likely explanations" for a defendant's conduct. *Id.* at 681.

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must "continue to construe *pro se* filings liberally." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A "complaint [filed by a *pro se* prisoner] 'must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

III. Complaint

In his three-count Complaint, Plaintiff sues the following Defendants: Pima County; the Pima County Commissioners; the Pima County Board of Supervisors; Pima County Sheriff Mark D. Napier, Captain Joshua Arnold; "Pima County Sheriff Corrections" employees William C. Hill, Juan C. Sullivan, Vincent Duarte, Jesus Silva, Sergeant Basznianyn, and Lieutenants Paravano and Lieutenant Smead; Pima County Sheriff's Department employees D. Black, Jeffrey Palmer, J.P. Siress, and Matthew E. Heath; the Pima County Health Department; Pima County Health Department employee William Martz and Nurse Misa Song; Correct Care Solutions; Byron Gwaltney; Darin Stephens; James Smead; Francisco Garcia; Todd Lepird; Marcia Ortega; and John Doe 1. In his Request for Relief, Plaintiff seeks monetary damages and injunctive relief.

In **Count One**, Plaintiff alleges he was subjected to excessive force. He claims that on June 3, 2017, he and other pretrial detainees were on the recreation yard and were communicating with individuals on another recreation yard, which is a major rule violation (Doc. 1 at 5.)[2] Plaintiff contends that Defendant Hill told the detainees to stop, but singled out Plaintiff. (*Id.*) Plaintiff asserts that he complied, exited the yard, and was trying to follow Defendant Hill's commands and return to his housing unit by "walking out of harm[']s way with [his] hands up in a non-threatening gesture while staying

[2] The citation refers to the document and page number generated by the Court's Case Management/Electronic Case Filing system.

TERMPSREF

calm." (*Id.*) Plaintiff contends Defendant Hill was unprofessional and aggressive, used inflammatory language, approached Plaintiff with closed fists, and punched and pushed Plaintiff. (*Id.*) Plaintiff claims that while he was "being assaulted," he was engaged in "defense by striking" in an attempt to deflect Defendant Hill's punches. (*Id.*)

Plaintiff contends he backed into a wall and dropped to the floor, where he placed himself face first with his hands behind his back to avoid harm. (*Id.*) He claims that although he was "no longer on his feet or even a threat," Defendants Sullivan, Duarte, and Silva joined Defendant Hill in using closed fist strikes and kneeing, kicking, and stomping on Plaintiff's back and head. (*Id.* at 5-6.) Plaintiff asserts that Defendant Sullivan kicked and stomped him, then used mace twice while Plaintiff was lying on his stomach on the floor. (*Id.* at 6.) Plaintiff claims Defendant Silva tazed him twice, and the prongs from the tazer were in the back of Plaintiff's arm, which "show[s] Pl[ai]ntiff had his arms behind him facing the floor when he got tazed." (*Id.*) Plaintiff claims he had a seizure, was going in and out of consciousness, and was bleeding from his mouth, nose, head, and cheek because he was facing the floor while he was assaulted. (*Id.*)

Plaintiff alleges that Defendant John Doe picked up Plaintiff to escort him to the medical department and "allow[ed] Plaintiff['s] head to slam into [the] door frame." (*Id.*) Plaintiff asserts that at the medical department, Defendant Song allowed an officer to pull the tazer prongs out of Plaintiff's arm "in a[n] aggressive manner." (*Id.*) Plaintiff contends that he does not know if the officer was "trained medical staff." (*Id.*)

Plaintiff asserts that he was "denied during interactions" with Defendant Song, Defendant Basznianyn, and shift leaders "for retaliatory reasons." (*Id.*) He claims one of the shift leaders stated that "only his staff members could go to the hospital[,] not Pl[ai]ntiff." (*Id.*) Plaintiff claims he was "cleared," although he had open wounds, and was escorted to a cell without a mattress or shower for the next twenty-four hours. (*Id.*)

Plaintiff alleges he submitted a grievance, but received less-than-adequate responses because there were lax and impartial investigations and impartial responses. (*Id.*) He contends Defendants Napier, Arnold, Pima County Commissioners,

and Pima County Board of Supervisors should be held liable for their subordinates' actions, "negligent supervision," "[i]mproper training on [the] use of force," and the "policies of [D]efendant[]s." (*Id.* at 6-7.) Plaintiff further asserts that Defendants should be "held liable for unprofessional stand[a]rds" because they held Plaintiff "in [the] spotlight by waiting 2 months to hold Plaintiff liable," but paid "no attention to mistakes leaving Pl[ai]ntiff to harassment and hostile environment created by Defend[a]nts of Pima County Sheriff[']s Department in excessive force from [D]efend[a]nts creating dangerous environment for Pl[ai]ntiff and pretrial detainee[]s." (*Id.*)

In **Count Two**, Plaintiff alleges he was subjected to deliberate indifference to his serious medical needs while at the Pima County Jail. He claims he did not receive proper medical care on June 3, 2017, and on subsequent occasions. (*Id.* at 8.) Plaintiff contends that during Defendant Song's July 3, 2017 evaluation, she denied Plaintiff proper medical care, "proper stand[a]rd procedure and policy stand[a]rd." (*Id.*) He asserts that he requested to go to the hospital, but his request was denied by Defendants Song, Basznianyn, and Doe after Defendant Doe told Defendant Song that only his employees could go to the hospital, not Plaintiff. (*Id.*) Plaintiff claims Defendant Song denied Plaintiff's request to go to the hospital based on Defendant Doe's statement rather than her own experience. (*Id*) He notes that Defendant Song paid no attention when he told her that he had suffered a seizure; did not "do vitals," even though Plaintiff was bleeding from his nose, mouth, and both temples; and knew Plaintiff had been subjected to severe injuries, including head trauma, abrasions, lacerations on his head and face, back and neck pain, and severe headaches. (*Id.*) He also claims Defendant Song allowed an officer to pull the tazer prongs out of Plaintiff's arm in an "aggressive manner," which caused Plaintiff "more pain than intended." (*Id.*) Plaintiff alleges Defendant Song allowed him to wash his face with water because he had been exposed to the mace, but then cleared Plaintiff to return to a cell. (*Id.* at 9.)

Plaintiff alleges he received "less than adequate" responses because they were not sent to an impartial third party or investigated thoroughly. (*Id.*) He also asserts that on

several occasions after the incident, he did not receive treatment. (*Id.*) He claims that three days after the incident, he was not allowed to see a doctor because he had "refused." (*Id.*) Plaintiff contends he never refused treatment and only requested to see a doctor, but "Defend[a]nts wrote it up as a refusal." (*Id.*) Plaintiff asserts that "Defend[a]nts oversee issues while [Defendant] Correct Care Solutions leave[s] Pl[ai]ntiff with sever[e] back pains untreated[,] as well as bloody noses and migraine headaches." (*Id.*) Plaintiff claims that pursuant to policy, he received "muscle rub" and ibuprofen for a short period of time, but he is still in pain and his back pain has gone untreated. (*Id.*) Plaintiff contends Defendants refuse to treat his chronic pain and have given him a medication for his migraines that contains caffeine, which makes it difficult to sleep. (*Id.*) He also asserts that he has suffered a lack of sleep from agonizing pain for over six months. (*Id.*) Plaintiff contends that these issues ultimately stem from the negligence of the "Pima County Sheriff's Department of Corrections"; Defendants Pima County Health Department, Napier, Arnold, Pima County Commissions, Pima County Board of Supervisors, and Correct Care Solutions; and "subordinate employees." (*Id.*)

In **Count Three**, Plaintiff alleges he was subjected to retaliation and a denial of due process. He claims Defendant Lieutenant Smead and "John Doe" failed to investigate Plaintiff's grievance alleging that he had been subjected to excessive force. (*Id.* at 10.) Plaintiff contends that he made an "internal investigations" request to Defendant Black and that a family member made a complaint to the Pima County Sheriff's Office, but the complaints were "subject[ed] to less than adequate attention." (*Id.*) He claims "Defend[a]nts leave Pl[ai]ntiff under strict scrutiny w[h]ere Defend[a]nts lab[el] Pl[ai]ntiff as [a] snitch, creating hostile, retail[a]tory interactions through[]out Pl[ai]ntiff's stay." (*Id.*)

Plaintiff also claims he was denied due process because he was not given "adequate thorough investigations," in an effort to sweep the incident under the rug. (*Id.*) He contends "Defend[a]nts even go as far as to allow" Defendants Siress and Heath "to provide a blind eye to delicate substan[t]ial proof to prove Pl[ai]ntiff [was] compliant"

by "allowing videos to cease [to] exist[]." (*Id.*) Plaintiff also alleges they "denie[d] Pl[ai]ntiff a question[n]aire" to an officer and did not allow the officer to be a be a witness in the grievance process. (*Id.*) He asserts that "Defend[a]nts" used "Griev[a]nce #17-1642 on date 6/6/17 to look as if incident Griev[a]nce #17-1621 took place on 6/6/17, but [it] actually occur[r]ed on different occasions and 2 different dates." (*Id.* at 10-11.) Plaintiff contends the excessive force issue was never addressed in his grievances, only the medical issue, and he was "not allowed to address excessive force in internal investigation." (*Id.* at 11.) Plaintiff asserts that hearing officers are "merely a rubber stamp for officer's and sergeant['s] use only[,] leaving Plaintiff under micro-management and toxic leader[]s." (*Id.*) Plaintiff claims he timely submitted a notice of claim to Defendant Pima County Commissioners, but did not receive a response. (*Id.*) Plaintiff alleges that his "in house jail griev[a]nce deem partial, administrative remedies [are] unavailable to pretrial detainee[]s." (*Id.*) Plaintiff appears to allege liability by Defendants Napier, Pima County Commissioners, Pima County Board of Supervisors, Arnold, "subordinate employees in the entity of Pima County Sheriff['s] Office and Pima County Health Department, [and] Correct Care Solutions." (*Id.*)

IV. Discussion of Complaint

Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled. *Id.*

To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific injury as a result of specific conduct of a defendant and show an affirmative link between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976). "A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

A. Count One

The Fourteenth Amendment's Due Process Clause, and not the Eighth Amendment, applies to the use of excessive force against pretrial detainees that amounts to punishment. *Kingsley v. Hendrickson*, ___ U.S.___, ___, 135 S. Ct. 2466, 2473 (2015); *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). Force is excessive if the officers' use of force was "objectively unreasonable" in light of the facts and circumstances confronting them, without regard to their mental state. *Kingsley*, 135 S. Ct. at 2472-73; *see also Graham v. Connor*, 490 U.S. 386, 397 (1989) (applying an objectively unreasonable standard to a Fourth Amendment excessive force claim arising during an investigatory stop). In determining whether the use of force was reasonable, the Court should consider factors including, but not limited to

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Kingsley, 135 S. Ct. at 2473.

Because officers are often forced to make split-second decisions in rapidly evolving situations, the reasonableness of a particular use of force must be made "from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Id.* at 2473-74 (citing *Graham*, 490 U.S. at 396). Further, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Constitution. *Graham*, 490 U.S. at 396 (citation omitted).

Liberally construed, Plaintiff has stated an excessive force claim against Defendants Hill, Sullivan, Duarte, and Silva in Count One. However, Plaintiff's allegations do not support excessive force claims against the other Defendants named in the Count One.

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Although Plaintiff alleges that Defendant John Doe "allowe[d] Pl[ai]ntiff['s] head to slam into [the] door frame" when he was escorting Plaintiff to the medical department, it is unclear whether Plaintiff is alleging that Defendant John Doe intentionally allowed Plaintiff's head to hit the door frame, or whether this was merely accidental. Absent more specific allegations, Plaintiff has failed to state an excessive force claim against Defendant John Doe. Likewise, Plaintiff's allegations that Defendant Song allowed an officer to pull the tazer prongs out of Plaintiff's arm "in a[n] aggressive manner" and that Defendants Song and Basznianyn did not allow him to go to the hospital do not support an excessive force claim.

To the extent Plaintiff contends Defendants Napier, Arnold, Pima County Commissioners, and Pima County Board of Supervisors should be held liable for their subordinates' actions, he is incorrect. There is no respondeat superior liability under § 1983, and therefore, a defendant's position as the supervisor of persons who allegedly violated Plaintiff's constitutional rights does not impose liability. *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

To the extent Plaintiff alleges that Defendants Napier, Arnold, Pima County Commissioners, and Pima County Board of Supervisors should be held liable for negligent supervision, improper training, unprofessional standards, and their policies, Plaintiff has simply made vague and conclusory allegations against a group of Defendants, without any factual specificity as to what any particular Defendant did or failed to do. This is insufficient. *See Marcilis v. Township of Redford*, 693 F.3d 589, 596 (6th Cir. 2012) (upholding dismissal of *Bivens* complaint that referred to all defendants "generally and categorically" because the plaintiff had failed to "'allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted

constitutional right.'" (quoting *Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008))); *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) ("Given the complaint's use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed.").

In addition, to state a claim based on a failure to train or supervise, a plaintiff must allege facts to support that the alleged failure amounted to deliberate indifference. *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998). A plaintiff must allege facts to support that not only was particular supervision or training inadequate, but also that such inadequacy was the result of "a 'deliberate' or 'conscious' choice" on the part of the defendant. *Id.* at 1213-14; *see Clement v. Gomez,* 298 F.3d 898, 905 (9th Cir. 2002) (a plaintiff must allege facts to support that "in light of the duties assigned to specific officers or employees, the need for more or different training is [so] obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policy[]makers . . . can reasonably be said to have been deliberately indifferent to the need." (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989))). A plaintiff must also show a "sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (citations omitted). Plaintiff has failed to make any allegations that would support a conclusion that any named Defendant failed to supervise or train employees, what supervision or training was provided, the ways in which that supervision or training was inadequate, and how those inadequacies led to Plaintiff's injuries.

Finally, to the extent Plaintiff is raising a claim regarding a policy or standard created or implemented by Defendants Napier, Arnold, Pima County Commissioners, and Pima County Board of Supervisors, Plaintiff's allegations are insufficient because he has failed to identify any particular policy or standard that resulted in a violation of his constitutional rights.

Thus, the Court will order Defendants Hill, Sullivan, Duarte, and Silva to answer the relevant portions of Count One[3] and will dismiss the remainder of Count One against the other Defendants named in that count.

B. Count Two

The Ninth Circuit Court of Appeals has held that "claims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate

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[3] The Court notes that Plaintiff is currently charged in the Pima County Superior Court, case number CR20173403, with having committed aggravated assault on Defendant Hill occurring on June 3, 2017. *See* http://www.agave.cosc.pima.gov/Agave Partners/ (Search "Case Number" for "CR20173403" and click on hyperlink for the July 28, 2017 Direct Indictment) (last visited July 31, 2018).

The abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), prevents a federal court in most circumstances from directly interfering with ongoing criminal proceedings in state court. *Younger* principles also apply to a plaintiff's request for damages, but in that situation, a temporary stay, rather than dismissal, is appropriate. *Gilbertson v. Albright*, 381 F.3d 965, 981 (9th Cir. 2004). Staying the federal case until the state court criminal case is no longer pending

> allows the federal plaintiff an opportunity to pursue constitutional challenges in the state proceeding (assuming, of course, that such an opportunity is available under state law), and the state an opportunity to pass on those constitutional issues in the context of its own procedures, while still preserving the federal plaintiff's opportunity to pursue compensation in the forum of his choice. In this way, neither the federal plaintiff's right to seek damages for constitutional violations nor the state's interest in its own system is frustrated.

Id.

Likewise, in *Wallace v. Kato*, 549 U.S. 384 (2007), the Supreme Court stated:

> [i]f a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended. If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck [v. Humphrey*, 512 U.S. 477 (1994)], will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.

381 F.3d at 393-94 (citations omitted).

At this point, the Court makes no determination as to whether *Younger*, *Gilbertson*, and *Wallace* may be applicable.

indifference standard." *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) (quoting *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016)). To state a medical care claim, a pretrial detainee must show

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Id. at 1125. "With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn[] on the facts and circumstances of each particular case.'" *Castro*, 833 F.3d at 1071 (quoting *Kingsley*, 135 S. Ct. at 2473; *Graham*, 490 U.S. at 396).

The "'mere lack of due care by a state official' does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." *Castro*, 833 F.3d at 1071 (quoting *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). A plaintiff must "prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* A mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

Liberally construed, Plaintiff has stated a medical care claim against Defendant Song. However, Plaintiff's allegations do not support medical care claims against the other Defendants named in the Count Two.

As to Defendant Basznianyn, it unclear from Plaintiff's allegations what he allegedly did or failed to do. As to Defendant Doe, Plaintiff alleges that Defendant Doe told Defendant Song that only his employees could go to the hospital, but Plaintiff could not. Plaintiff does not allege, however, that Defendant Doe had any authority over Defendant Song or any authority to override Defendant Song's conclusions regarding

Plaintiff's need for hospital care. Absent more, Plaintiff's allegations do not support a medical care claim against Defendants Basznianyn and Doe.

Plaintiff's remaining claims are nothing more than vague and conclusory allegations against a group of Defendants, without any factual specificity as to what any particular Defendant did or failed to do. As previously explained, this is insufficient to state a claim. Moreover, mere negligence is insufficient to state a Fourteenth Amendment medical claim. *See Castro*, 833 F.3d at 1071.

Thus, the Court will order Defendant Song to answer the relevant portions of Count Two and will dismiss the remainder of Count Two against the other Defendants named in that count.

C. Count Three

Although Plaintiff's allegations are difficult to follow, Plaintiff appears to raise claims regarding the grievance process. Prisoners have a First Amendment right to file prison grievances, *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005), but "[t]here is no legitimate claim of entitlement to a grievance procedure," *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988), and the failure to follow grievance procedures does not give rise to a due process claim. *See Flournoy v. Fairman*, 897 F. Supp. 350, 354 (N.D. Ill. 1995) (jail grievance procedures did not create a substantive right enforceable under § 1983); *Spencer v. Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986) (violations of grievance system procedures do not deprive inmates of constitutional rights). "[N]o constitutional right was violated by the defendants' failure, if any, to process all of the grievances [plaintiff] submitted for consideration." *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993). In addition, "[t]he right to petition the government for redress of grievances . . . does not guarantee a favorable response, or indeed any response, from state officials. Moreover, the First Amendment's right to redress of grievances is satisfied by the availability of a judicial remedy." *Baltoski v. Pretorius*, 291 F. Supp. 2d 807, 811 (N.D. Ind. 2003); *see also Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 569 (W.D. Va. 2000) (failure to comply with state's grievance procedure is not actionable under § 1983 and

does not compromise an inmate's right of access to the courts). Plaintiff has failed to state a claim regarding the grievance process.

In addition, although Plaintiff identifies "retaliation" as one of the issues involved in his claim, he has failed to state a retaliation claim. A viable claim of First Amendment retaliation contains five basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights (or that the inmate suffered more than minimal harm) and (5) did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) (retaliation claims require an inmate to show (1) that the prison official acted in retaliation for the exercise of a constitutionally protected right, and (2) that the action "advanced no legitimate penological interest"). The plaintiff has the burden of demonstrating that his exercise of his First Amendment rights was a substantial or motivating factor behind the defendants' conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

Plaintiff has failed to identify how he was subjected to retaliation. Moreover, to the extent he alleges that "Defend[a]nts" labeled him as a "snitch," he has failed to identify which Defendants labeled him as a snitch and to whom. Plaintiff's allegations are simply too vague and conclusory to state a retaliation claim.

Thus, the Court will dismiss without prejudice Count Three.

V. Warnings

A. Release

If Plaintiff is released while this case remains pending, and the filing fee has not been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court that he intends to pay the unpaid balance of his filing fee within 120 days of his release or (2) file a non-prisoner application to proceed in forma pauperis. Failure to comply may result in dismissal of this action.

B. Address Changes

Plaintiff must file and serve a notice of a change of address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other relief with a notice of change of address. Failure to comply may result in dismissal of this action.

C. Copies

Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit an additional copy of every filing for use by the Court. *See* LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice to Plaintiff.

D. Possible Dismissal

If Plaintiff fails to timely comply with every provision of this Order, including these warnings, the Court may dismiss this action without further notice. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to comply with any order of the Court).

IT IS ORDERED:

(1) Plaintiff's Application to Proceed In Forma Pauperis (Doc. 2) is **granted.**

(2) As required by the accompanying Order to the appropriate government agency, Plaintiff must pay the $350.00 filing fee and is assessed an initial partial filing fee of $13.07.

(3) Count Three is **dismissed** without prejudice.

(4) Defendants Napier, Arnold, Pima County Commissioners, the Pima County Board of Supervisors, Black, Palmer, Siress, Heath, Basznianyn, Paravano, Lieutenant Smead, Pima County Health Department, Correct Care Solutions, Martz, Gwaltney, Stephens, James Smead, Garcia, Lepird, Ortega, Pima County, and John Doe 1 are **dismissed** without prejudice.

(5) Defendants Hill, Sullivan, Duarte, and Silva must answer Count One; Defendant Song must answer Count Two.

(6) The Clerk of Court must send Plaintiff a service packet including the Complaint (Doc. 1), this Order, and both summons and request for waiver forms for Defendants Hill, Sullivan, Duarte, Silva, and Song.

(7) Plaintiff must complete and return the service packet to the Clerk of Court within 21 days of the date of filing of this Order. The United States Marshal will not provide service of process if Plaintiff fails to comply with this Order.

(8) If Plaintiff does not either obtain a waiver of service of the summons or complete service of the Summons and Complaint on a Defendant within 90 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(ii).

(9) The United States Marshal must retain the Summons, a copy of the Complaint, and a copy of this Order for future use.

(10) The United States Marshal must notify Defendants of the commencement of this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The Marshal must immediately file signed waivers of service of the summons. If a waiver of service of summons is returned as undeliverable or is not returned by a Defendant within 30 days from the date the request for waiver was sent by the Marshal, the Marshal must**:

(a) personally serve copies of the Summons, Complaint, and this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

(b) within 10 days after personal service is effected, file the return of service for Defendant, along with evidence of the attempt to secure a waiver of service of the summons and of the costs subsequently incurred in effecting service

upon Defendant. The costs of service must be enumerated on the return of service form (USM-285) and must include the costs incurred by the Marshal for photocopying additional copies of the Summons, Complaint, or this Order and for preparing new process receipt and return forms (USM-285), if required. Costs of service will be taxed against the personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure, unless otherwise ordered by the Court.

(11) **A Defendant who agrees to waive service of the Summons and Complaint must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

(12) Defendants Hill, Sullivan, Duarte, Silva, and Song must answer the relevant portions of the Complaint or otherwise respond by appropriate motion within the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

(13) Any answer or response must state the specific Defendant by name on whose behalf it is filed. The Court may strike any answer, response, or other motion or paper that does not identify the specific Defendant by name on whose behalf it is filed.

Dated this 2nd day of August, 2018.

Honorable James A. Soto
United States District Judge

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